Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1996

TOM GRIMMETT, AS TRUSTEE FOR THE BANKRUPTCY ESTATE OF VINCENT SIRAGUSA, and JOANNE SIRAGUSA,

Petitioners,

v.

PATRICIA L. BROWN, PATRICIA L. BROWN, LTD., and BECKLEY, SINGLETON, DELANOY, JEMISON & LIST, CHTD.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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TABLE OF CONTENTS

Page

I. PETITIONER'S RICO ACTION DID NOT ACCRUE IN 1989, NOR IS IT MOOT..... 1

II. THE "INJURY AND PATTERN DISCOVERY" ACCRUAL RULE IS REQUIRED BY THE CIVIL RICO STATUTE AND BY GENERAL PRINCIPLES OF ACCRUAL 7

CONCLUSION 16

TABLE OF AUTHORITIES

Page

CASES

Agency Holding Corp. v. Malley-Duff & Associates, Inc., 483 U.S. 143 (1987) 8, 9, 13

Agristor Financial Corp. v. Van Sickle, 967 F.2d 233 (6th Cir. 1992) 14

Association of Commonwealth Claimants v. Moylan, 71 F.3d 1398 (8th Cir. 1995) 14

Bailey v. Glover, 88 U.S. 342 (1874) 11

Bankers Trust Co. v. Rhoades, 859 F.2d 1096 (2d Cir. 1988), *cert. denied*, 490 U.S. 1007 (1989) 1, 3, 4, 14

Caproni v. Prudential Securities, Inc., 15 F.3d 614 (6th Cir. 1994) 15

Flintkote Co. v. Lysfjord, 246 F.2d 368 (9th Cir.), *cert. denied*, 355 U.S. 835 (1957) 7

Granite Falls Bank v. Henrikson, 924 F.2d 150 (8th Cir. 1991) 13

H.J. Inc. v. Northwestern Bell Telephone Co., 492 U.S. 229 (1989) 11

Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982) 11

Holmberg v. Armbrecht, 327 U.S. 392 (1946) 10

Imagineering, Inc. v. Kiewit Pacific Co., 976 F.2d 1303 (9th Cir. 1992), *cert. denied*, 507 U.S. 1004 (1993) ...2, 6

Keystone Ins. Co. v. Houghton, 863 F.2d 1125 (3d Cir. 1988) 9

Klehr v. A.O. Smith Corp., 87 F.3d 231 (8th Cir. 1996) 15

TABLE OF AUTHORITIES – Continued

Page

McCool v. Strata Oil Co., 972 F.2d 1452 (7th Cir. 1992) 12, 13, 14

Rodriguez v. Banco Central, 917 F.2d 664 (1st Cir. 1990) 14

Schrag v. Dinges, 150 F.R.D. 664 (D. Kan. 1994), *aff'd*, 73 F.3d 374 (10th Cir. 1995) 15

Sedima S.P.R.L. v. Imrex Co., 473 U.S. 479 (1985) 2

Siragusa v. Siragusa, 843 P.2d 807 (Nev. 1992) 1, 2

United States v. Bornstein, 423 U.S. 303 (1976) 7

United States v. Kubrick, 444 U.S. 111 (1979) 12

United States v. Turkette, 452 U.S. 576 (1981) 10

STATUTES AND RULES

11 U.S.C. § 330 7

11 U.S.C. § 501 6

11 U.S.C. § 541 5

11 U.S.C. § 704 5

11 U.S.C. § 726 .....6, 7

11 U.S.C. § 727(a) 2

11 U.S.C. § 727(e) 3

18 U.S.C. § 664 10

18 U.S.C. §§ 891-894 10

18 U.S.C. § 1341 10

TABLE OF AUTHORITIES – Continued

Page

18 U.S.C. § 1343 10

18 U.S.C. § 1954 10

18 U.S.C. § 1961(5) 9

18 U.S.C. § 1964(c) 7

Fed. R. Bankr. P. 4004 2

MISCELLANEOUS

2 Calvin W. Corman, *Limitation of Actions* § 1.11.1 (1991) 12

54 C.J.S. *Limitations of Actions* § 87 (1987) 12

I. PETITIONERS' RICO ACTION DID NOT ACCRUE IN 1989, NOR IS IT MOOT

Both Respondents present several arguments which merely serve to re-emphasize one of Petitioners' principal points: until Joanne Siragusa is compelled to accept less than 100% of her pre-existing debt she has not suffered concrete RICO damage. In attempting to evade the logic of *Bankers Trust Co. v. Rhoades*, 859 F.2d 1096 (2d Cir. 1988), *cert. denied*, 490 U.S. 1017 (1989), Respondents cannot agree amongst themselves as to the time of Joanne's RICO injury. Respondent Brown argues that Joanne knew of her potential injury in 1989 so the limitations period has already run. Respondent Beckley, Singleton argues that Joanne may have been injured as a result of her 1994 settlement with her husband but inexplicably concludes that the RICO case is moot. Neither position has merit.

1. As detailed in Petitioners' initial brief, the various divorce proceedings between Joanne and Vincent Siragusa, summarized by the Supreme Court of Nevada in *Siragusa v. Siragusa*, 843 P.2d 807 (Nev. 1992), resulted in Vincent's substantial indebtedness to Joanne in terms of both alimony and property settlement obligations. At the time Vincent filed for Chapter 7 bankruptcy protection, on November 10, 1987, these obligations included both arrearages and future payments. *Id.* at 809.

Respondent Brown urges that Joanne's RICO injury occurred when she filed her Adversary Complaint in Bankruptcy Court in 1989, yet she tacitly admits that Joanne, at best, had suffered only *"potential* damage." Respondent Brown Answering Brief at 23 (emphasis added). As Petitioner explained in her initial Brief, "an

attempt, even a successful attempt, to subvert an underlying security interest . . . is not itself a RICO injury unless and until the debt that is being secured is 'lost.' " Petitioners' Brief at 20.

Respondent urges that Joanne was aware of her *potential injury* when she learned that her payments from Vincent were in jeopardy. Specifically, Respondent Brown suggests that Joanne became "aware of the extent of potential damage by May of 1989." Respondent Brown Answering Brief at 23. However, being aware of the potential damage is not sufficient to meet the injury requirement mandated by this Court in *Sedima S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985), a requirement characterized by the Ninth Circuit as an injury that amounts to a *"concrete financial loss." Imagineering, Inc. v. Kiewit Pacific Co.*, 976 F.2d 1303, 1310 (9th Cir. 1992) (emphasis added), *cert. denied*, 507 U.S. 1004 (1993).

Respondent Brown also points to Vincent's preliminary discharge on May 4, 1988, as another point when Joanne would have known the extent of her potential damage. Respondent Brown's Brief at 24. Yet again this event did not cause Joanne a RICO injury because she was not at that point compelled to accept less than 100% of her pre-existing debt and because the determination of Vincent's legal obligation was not final. The preliminary discharge was granted on May 4, 1988, as an automatic statutory requirement because none of the creditors objected to Vincent's filing within the time allotted. *See Siragusa v. Siragusa*, 843 P.2d at 809; *see also* 11 U.S.C. § 727(a); Fed. R. Bankr. P. 4004.

Such a discharge, however, remains subject to revocation *for one year* by a creditor or Trustee upon proof that the discharge was obtained by fraud and the moving party did not know of the fraud at the time of discharge. 11 U.S.C. § 727(e). Less than a year later, on May 2, 1989, Joanne and the Trustee filed their adversary complaint in Bankruptcy Court seeking revocation of Vincent's discharge for fraud. (J.A. 186). From that point on, Joanne and the Trustee sought to untangle the defendants' various fraudulent transfers and to effect the return of the property to the Bankruptcy Estate. As the Second Circuit recognized in *Bankers Trust*, a RICO cause of action cannot be said to have accrued in such a situation.

Notably, Respondent Brown's Answering Brief is silent with respect to the Second Circuit's decision in *Bankers Trust*, 859 F.2d 1096. The defrauded creditor in *Bankers Trust* faced nearly the exact same circumstances as Joanne has faced in the instant case. Moreover, the creditor in *Bankers Trust* already had accepted a Chapter 11 Reorganization Plan, agreed to receive only 17.5% of its debt, and agreed to relieve the debtor of its remaining debt obligation. *Id.* at 1098. When it learned of evidence of fraudulent transfers, the creditor moved in Bankruptcy Court to revoke the reorganization plan on the ground that it had been obtained by fraud. *Id.* at 1099.

The reopened Bankruptcy Proceeding meant that the creditor's debt had not been finally "lost," and the question of a RICO injury was, therefore, found to be speculative. *Id.* at 1106. In light of these facts, the court held as follows:

> [A]fter the claims . . . are dealt with by the bankruptcy court – through recovery of all or part of [the fraudulently transferred corporate] assets, an order of abandonment, or some other final disposition of the lost-debt claims – [plaintiff's] injury will be ascertainable, an action as to the injury will accrue, and [plaintiff] will then have four years to bring a civil RICO action to recover the damages it has suffered in this area, subject of course to the normal rules and procedures governing such claims.

Bankers Trust, 859 F.2d at 1106. In short, the Second Circuit concluded that the creditor had not yet suffered a RICO injury since the Bankruptcy Proceeding was still open and the Trustee was attempting to recover fraudulently transferred assets.

2. Respondent Beckley, Singleton argues that two settlements within the Bankruptcy Proceeding have rendered the RICO case moot or have fully compensated Joanne for her RICO injury. Neither assertion is correct.

Respondent asserts that a settlement between Joanne, the Trustee, and Vincent, renders moot Petitioner's RICO case. Respondent Beckley, Singleton Brief at 2-3. This argument, however, ignores the clear terms of the Settlement Agreement – a Settlement Agreement that Respondents Beckley, Singleton, Delanoy, Jemison & List themselves attached to their brief as an appendix.

In the summer of 1994, Joanne and the Trustee entered into a comprehensive settlement agreement with Vincent that, subsequently, was approved by the Bankruptcy Court. Respondent Beckley, Singleton Brief, Appendix pp. 1-53. Vincent agreed to pay Joanne

$160,000 toward his alimony arrearage obligations and agreed to pay to the Bankruptcy Estate $40,000 toward its claims in the Adversary Proceeding. In return, Joanne released any personal claims against Vincent (other than future alimony claims), and the Bankruptcy Estate released its claims against Vincent. As part of the agreement, Vincent agreed to have his preliminary discharge revoked. App. at 20, 21.

The Settlement Agreement, however, explicitly preserved Joanne's right to receive payment against the Bankruptcy Estate for her pre-existing debts, as follows:

> B. The Releases by Joanne shall not extend or operate with respect to any claims by Joanne against the Bankruptcy Estate, including without limitation Joanne's Proof of Claim, all of which such claims by Joanne shall survive against the Bankruptcy Estate.

App. at 17. Moreover, the settlement explicitly preserved both Joanne's and the Estate's rights to proceed against the Respondents, by providing that the releases "shall not extend to or operate in favor of [the Respondents]." App. at 16.

In short, the settlement left Joanne in much the same position she had been in since Vincent filed his Chapter 7 Bankruptcy petition in 1987. Vincent's personal obligation to Joanne may have been extinguished, but Joanne's right to collect from Vincent's Bankruptcy Estate on the pre-existing debt remained. At the moment of Vincent's filing, a Bankruptcy Estate was created comprised of all of Vincent's property, "wherever located and by whomever held. . . . " 11 U.S.C. § 541. A Trustee was then appointed to "collect and reduce to money the property of the estate." 11 U.S.C. § 704. This money ultimately

would be distributed to those creditors who had filed timely proofs of claim. 11 U.S.C. §§ 501, 726. Joanne's settlement with Vincent left her awaiting payment of her pre-existing debt from the funds collected by the Trustee belonging to the Bankruptcy Estate.[1]

3. Respondent Brown contends that because Joanne and the Bankruptcy Estate have received settlement funds from Vincent and from others in an amount that may exceed the value of Joanne's property settlement, her potential loss has been fully recovered and, thus, she has suffered no concrete injury. Respondent Brown Answering Brief at 28-30. Consequently, Respondents argue, Joanne is unable to maintain a RICO cause of action.

It is impossible at this point to determine whether the two settlements referenced by Respondents cover Joanne's injury. As discussed *supra*, the settlement with Vincent had two components: payment to Joanne for alimony arrearages and a payment into the Bankruptcy Estate. The adversary complaint against Vincent which was settled included several state and federal causes of action and requests for relief, including one for punitive damages and one for costs. (JA 210, 216). The settlement with other

[1] Joanne's non-alimony release of Vincent in the 1994 Settlement Agreement, far from rendering the RICO case moot, may in fact represent the first incidence of the type of "concrete financial loss" necessary to maintain the RICO action. *Imagineering*, 976 F.2d at 1310. If Joanne can demonstrate in the RICO action that Vincent's inability to pay her more than the settlement amount was as a result of the Respondents' racketeering activity, then the accrual of her RICO cause of action began at the earliest in 1994 at the time of the settlement.

defendants in the adversary complaint proceeding, referenced in Respondent Brown's Brief at 29 but not placed into the record, suffers from some of the same attributes: some of the funds were paid to the Bankruptcy Estate based on various causes of action and requests for relief.

The effect of either settlement on Joanne's RICO claim cannot at this point be determined. At this point it is impossible to determine how much Joanne will receive from Vincent's Bankruptcy Estate once the expenses of the estate are paid, 11 U.S.C. § 330, and in conjunction with distributions to any other creditors, 11 U.S.C. § 726.

Second, since Joanne's RICO damages will be trebled pursuant to 18 U.S.C. § 1964(c), any previously received payments deemed to be compensatory, whether from direct settlements or from the estate, will be subtracted from the trebled amount. *See, e.g., United States v. Bornstein*, 423 U.S. 303, 314 (1976); *Flintkote Co. v. Lysfjord*, 246 F.2d 368, 397 (9th Cir.), *cert. denied*, 355 U.S. 835 (1957). Thus, Respondents' argument that Joanne has at this point been fully compensated for her RICO injury is without merit.

II. THE "INJURY AND PATTERN DISCOVERY" ACCRUAL RULE IS REQUIRED BY THE CIVIL RICO STATUTE AND BY GENERAL PRINCIPLES OF ACCRUAL

Respondents and their amici cite numerous judicial opinions discussing the purposes served by statutes of limitations. Yet there is no dispute that RICO has a statute of limitations and that the limitations period is four

years. *See Agency Holding Corp. v. Malley-Duff & Associates, Inc.*, 483 U.S. 143 (1987). Rather, the issue before the Court here is when does the statute of limitations period begin to run. As to this accrual question, the Respondents' discussion of statutes of limitations adds nothing.

In their briefs, the Respondents completely ignore the civil RICO statute itself because the language and structure of the statute plainly argue for an accrual rule where the limitations period does not begin to run until a plaintiff knows or should have known both her injury *and* that her injury was the result of a pattern of racketeering. The Respondents also fail to discuss the accrual rules adopted by this Court and the lower courts in federal fraud and continuing violations cases, even though civil RICO actions closely resemble these types of cases. Respondents, instead, argue that this Court should be guided by the antitrust rule for accrual. The accrual rule developed under the Clayton Act is an anomaly unique to antitrust law and does not even contain the "discovery" requirement applied in all other federal statutes. Because having the limitations period run upon discovery of injury and a pattern of racketeering is the only rule consistent with the RICO statute and the circumstances faced by civil RICO plaintiffs, the decision of the court of appeals should be reversed.

1. It is striking that Respondents and their amici do not even attempt to address the language and structure of RICO. The reason for this omission is clear: the language and structure of the statute compel the "injury and pattern discovery" rule. The crux of a civil RICO cause of action is that a plaintiff must demonstrate a series of

predicate acts constituting a pattern of racketeering activity. "[T]he heart of any RICO complaint is the allegation of a *pattern* of racketeering." *Agency Holding Corp.*, 483 U.S. at 154 (emphasis in original). The "pattern of racketeering" concept was the new approach to fighting organized criminal activity which lies at the core of the RICO statute.

Contrary to the concern about "stale claims" expressed by Respondents, the RICO statute also provides that courts accept evidence relating to racketeering activity that is up to ten years in the past. 18 U.S.C. § 1961(5) of the RICO statute defines a "pattern of racketeering activity" as at least two predicate acts of racketeering activity, "the last of which occurred within ten years . . . after the commission of a prior act of racketeering." Congress plainly believed that attacking criminal activity took precedence over a defendant's concern about stale evidence. The restrictive "injury discovery" accrual rule conflicts with Congress' clear intent to allow plaintiffs to introduce evidence relating to older remote acts. "It would be inconsistent with this breadth of definition for us to state that we will look to the past ten years to see if a civil RICO claim exists but if we find ten years of racketeering activity, all related and all perpetrated by the same defendants, we will provide a remedy only to those who were victimized within the past four years." *Keystone Ins. Co. v. Houghton*, 863 F.2d 1125, 1132-33 (3d Cir. 1988).

In enacting RICO, Congress also understood that the criminal activity that the statute was attacking would be difficult to root out. The statute, through its "enterprise"

element and other provisions, was aimed at the infiltration of legitimate businesses for criminal ends. *See United States v. Turkette*, 452 U.S. 576, 591 (1981). For this reason, the statute listed numerous fraud-related crimes as the predicate acts constituting a pattern of racketeering.[2] In the typical RICO case, a plaintiff must uncover not one, but at least two, underlying frauds which are part of a pattern and which are being perpetrated by a seemingly legitimate business or union. Given the difficulty inherent in developing such a civil RICO claim, the "injury and pattern discovery" rule is superior in that it provides a less restrictive standard for victims of RICO schemes and links the accrual of the action to discovery of the RICO pattern.

2. Respondents and their amici also fail to explain why the accrual rule for federal fraud cases is not the most appropriate rule here. As noted above, most RICO actions are based on fraud as the predicate acts. In addition, the prototypical RICO scheme is in essence a complex fraudulent scheme whereby a legitimate business or union enterprise is infiltrated and operated for illicit ends. The federal fraud accrual rule therefore is highly relevant to the civil RICO context. The federal fraud accrual rule is not "injury discovery." Rather, in federal fraud cases, the limitations period commences only after the plaintiff discovered or should have discovered the fraud itself. *See Holmberg v. Armbrecht*, 327 U.S. 392, 397

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[2] *See* 18 U.S.C. § 664 (embezzlement from pension and welfare funds); 18 U.S.C. §§ 891-894 (extortionate credit transactions); 18 U.S.C. § 1341 (mail fraud); 18 U.S.C. § 1343 (wire fraud); 18 U.S.C. § 1954 (unlawful welfare fund payments).

(1946) (and cases cited at Pet. Br. 31-32, 37).[3] A comparable rule would require that the limitations period begin to run only after the civil RICO plaintiff had or should have discovered the RICO violation, *i.e.*, the pattern of predicate acts constituting the RICO offense.

Respondents and their amici also never address this Court's prior decision in *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982). In *Havens Realty*, the Court ruled that a pattern of "continuing violations" of the Fair Housing Act should be treated differently than one discrete act of discrimination. *Id.* at 380. As a result, the *Havens Realty* Court and various courts of appeals have applied an expansive view of accrual for such continuing violations. *See* Pet. Br. 37-39. Because civil RICO with its pattern requirement also is a "continuing violation" statute, *see H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 240-42 (1989), the "injury and pattern discovery" rule is similarly more appropriate than the restrictive rule adopted by the court of appeals here.

3. Respondents and their amici err in suggesting that the civil RICO statute should be governed by the accrual rule for antitrust claims under the Clayton Act. This argument for the Clayton Act accrual rule is grounded on a flawed premise. According to this argument, "fundamental statute-of-limitations principles compel adoption of the Clayton Act accrual rule, which

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[3] "[T]he decided weight of authority is in favor of the proposition that where the party injured by the fraud remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered." *Bailey v. Glover*, 88 U.S. 342, 348 (1874).

embodies no 'discovery' requirement." Am. Honda Br. 2. Yet, contrary to the contentions of Respondents and their amici, *see id.* at 3-10, the fundamental principle adopted by the federal courts in interpreting federal statutes is the very "discovery rule" that the Clayton Act rejected. That the "discovery" rule is the general rule for all federal statutes is stated clearly in the same treatises from which Respondents and their amici so selectively cite:

> The general rule applicable to federal statutes of limitations is that the limitations period begins to run when the claimant discovers or in the exercise of reasonable diligence should have discovered the acts constituting the alleged violation.

54 C.J.S. *Limitations of Actions* § 87, at 125 (1987). *See also* 2 Calvin W. Corman, *Limitation of Actions* § 1.11.1, at 134 n.3 (1991); Pet. Br. 39 n.19. As a commentator heavily relied on by amici (Am. Honda Br. 4-5) states about the use of the discovery rule,

> [t]his approach to the time of accrual of private civil RICO actions . . . applies the general federal rule of accrual (that is, the discovery rule).

Corman, *supra*, § 6.5.5 at 449. Thus, even though the Clayton Act's accrual rule lacks a discovery rule, "[e]very court that has considered an accrual rule for civil RICO has adopted some sort of discovery rule." *McCool v. Strata Oil Co.*, 972 F.2d 1452, 1465 (7th Cir. 1992).

In addition, the Clayton Act accrual rule does not require that the plaintiff have knowledge of the factual predicate of his claim. *See* Pet. Br. 34-36 (discussing *United States v. Kubrick*, 444 U.S. 111 (1979) and subsequent lower court decisions requiring this knowledge). Nor

does the Clayton Act accrual rule require that the plaintiff have knowledge of who inflicted the injury. Pet. Br. 36-37 (same). Accordingly, the restrictive Clayton Act accrual rule is aberrant, conflicting with general federal accrual principles. As such, it is an inappropriate model for the civil RICO statute.[4] *See also Granite Falls Bank v. Henrikson*, 924 F.2d 150, 152-53 (8th Cir. 1991).

4. Respondents and their amici also promise that the anomalous and indefensible outcomes arising under an "injury discovery" rule can be prevented by assorted tolling principles. According to this view, courts will intervene to avoid bad results through some conglomeration of equitable tolling, fraudulent concealment, separate accrual and other doctrines. However, there is little agreement among the lower courts as to how and when these doctrines are to be applied.[5] To relegate the parties

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[4] Respondents and their amici point to *Agency Holding Corp.*, where the Court looked to the Clayton Act's four year statute of limitations for the civil RICO limitations period. However, respondents have put forward no explanations as to why the Clayton Act accrual rules also must be borrowed. In fact, the *Agency Holding* Court plainly concluded that the limitations period and the accrual rule were not integrally tied together when it expressly declined to reach the accrual issue. In *Agency Holding*, the Court chose between the multiple state statute of limitations and the Clayton Act's four-year limitations period and ruled that a uniform four-year period was fair and reasonable. Here, the Clayton Act accrual rule is unduly restrictive and contrary to general federal accrual principles.

[5] *See, e.g., McCool v. Strata Oil*, 972 F.2d at 1465 (noting that only some of the courts of appeals apply the "separate accrual" rule to civil RICO claims and declining to decide whether some form of equitable tolling "delay[s] the running of the RICO limitations period while a victim diligently investigates the

and courts in civil RICO lawsuits to these vague doctrines is fundamentally unfair and a recipe for disaster. Moreover, reliance on these various tolling and other doctrines as a primary means of resolving accrual issues defeats the very goal of uniformity and predictability which this Court sought to achieve in *Agency Holding*, 483 U.S. at 154.

5. Finally, Respondents and their amici maintain that the "injury and pattern discovery" rule should be rejected because it would allow a plaintiff "to slumber on his rights without investigating whether the defendant has committed a pattern of racketeering activity." Respondent Beckley, Singleton Brief at 13. This argument misconstrues the rule advocated by Petitioners. Under the "injury and pattern discovery" rule, the action begins to accrue "as soon as the plaintiff discovers, or *reasonably should have discovered*, both the existence and source of his injury and that the injury is part of a pattern." *Association of Commonwealth Claimants v. Moylan*, 71 F.3d 1398, 1402 (8th Cir. 1995) (emphasis added). Therefore, if a civil RICO plaintiff sits on her rights or is otherwise less than diligent in investigating and bringing her action, the courts will dismiss the action on limitations grounds since the injury and pattern "reasonably should have been discovered" with the statutory period. *See, e.g., Agristor Financial Corp. v. Van Sickle*, 967 F.2d 233, 240-42 (6th

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possible existence and extent of a pattern of racketeering"); *Rodriguez v. Banco Central*, 917 F.2d 664, 667 (1st Cir. 1990) (declining to resolve applicability of tolling rules to civil RICO accrual); *Bankers Trust*, 859 F.2d at 1104 (stating, without explanation, that "the standard tolling exceptions apply").

Cir. 1992) (dismissing civil RICO action because plaintiff should have discovered injury and pattern within statutory period); *Caproni v. Prudential Securities, Inc.*, 15 F.3d 614, 619-20 (6th Cir. 1994) (same); *Klehr v. A.O. Smith Corp.*, 87 F.3d 231, 238-39 (8th Cir. 1996) (same); *Schrag v. Dinges*, 150 F.R.D. 664, 679 (D. Kan. 1994), *aff'd*, 73 F.3d 374 (10th Cir. 1995) (same).

In the instant case, it is clear that Petitioners were not slumbering on their rights. Joanne Siragusa aggressively pursued Vincent Siragusa for the monies rightfully due her, bringing numerous actions in state court and in the federal bankruptcy court. However, despite all of her efforts, not until December 1990 did Joanne Siragusa first learn that Dr. Heeren also had been the victim of various related fraudulent reorganizations and that attorney Patricia Brown had been a principal architect of these unlawful schemes. Joanne Siragusa filed her civil RICO lawsuit within four years of learning that hers was not an isolated case but instead was part of a pattern of racketeering activity engaged in by Patricia Brown and others. It would be grossly unfair, as well as contrary to the language, structure and policies of the civil RICO statute, to apply the restrictive accrual rule of the court below. Instead, this Court should adopt the "injury and pattern discovery" accrual rule which would allow Joanne Siragusa to obtain redress for her injuries and which would prevent Respondent's conduct from going unpunished.

CONCLUSION

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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